88- 1836

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

CHARLES A. HENRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether in a federal criminal prosecution before a jury where the government presents *accomplices as a matter of law* as its only key witnesses, and where the court instructs the jury that it may *convict* the defendant if the jury believes the *accomplices as a matter of law beyond a reasonable doubt*, are 5th Amendment due process of law denied and 6th Amendment rights for compulsory production of witnesses circumvented where the *accomplices as a matter of law* also give exonerating evidence, the jury failing to be instructed that the *exonerating* evidence can also be used to acquit the defendant if it *raises* a reasonable doubt?

2. Whether *Cool v. United States* (1972) 409 U.S. 100, a decision of this Honorable Court, so requires said instruction under constitutional due process of law?

3. Whether under the supervisory role of this Honorable Court over the lower federal courts must this court compel such an instruction?

4. Whether a conflict in the U.S. Circuit Courts between the U.S. 6th Circuit decisions in *United States v. Stulga*, 531 F.2d 1377 (6th Cir. 1976) (Stulga I) and *United States v. Stulga*, 584 F.2d 142 (6th Cir. 1978) (Stulga II) and the case at bar requires the grant of certiorari to resolve the conflict?

5. Alternately, whether the rule of *Cool v. United States* (1972) 409 U.S. 100 should be reexamined?

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. ___

CHARLES A. HENRY, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	) PETITION FOR) WRIT OF) CERTIORARI) TO THE) UNITED STATES) COURT OF) APPEALS FOR THE) FOURTH CIRCUIT

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charles A. Henry, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit from an unpublished decision entered February 21, 1989.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed petitioner's conviction on February 21, 1989 in an unpublished decision. That opinion is set forth at Appendix A. On March 16, 1989, the above court rejected a petition for rehearing and suggested hearing en banc. A copy of that order appears at Appendix B.

The 60 day period in which to file this petition expires on May 15, 1989.

JURISDICTION

Jurisdiction in this Honorable Court to review a final decision of a United States Court of Appeals in a criminal case is based on 28 U.S.C. 1254.

UNITED STATES CONSTITUTION AMENDMENTS INVOLVED

FIFTH AMENDMENT

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The United States prosecuted petitioner Charles A. Henry in the U.S. District Court, Western District of North Carolina, for conspiracy to traffic in cocaine, and related charges. 21 U.S.C. 846; 841(a)(1).

No cocaine was ever physically tied to appellant. Three key witnesses testifying for the government were denominated *accomplices as a matter of law* and the consequences of this categorization were partially explained to the jury.

Larry Dean Clark, the principal government witness, testified that he and *Charles Edward Franklin* had trafficked in cocaine in Georgia and North Carolina in 1985 using a source from Florida. In 1986, when this Florida source dried up, *Larry Dean Clark* sought a new source. The single new source came from California. At issue at trial was the identity of this source.

Prior to his arrest *Larry Dean Clark* had told various individuals that his new source (singular, not plural) was from California, and that this single source:

(a) had parents whose assets were being tied up by liens;

(b) had a wife confined to a mental institution;

(c) had owned a Blue Swedish Volvo in which that single source

(d) had brought the cocaine from California into North Carolina cached in the rocker panels of the blue Volvo;

(e) had a professional aircraft pilot friend that had smuggled the cocaine into the United States, into California, by aircraft; and

(f) had been introduced to one *Robert Snowdon* within North Carolina by *Larry Dean Clark.*

At trial on cross-examination *Larry Dean Clark* admitted that this foregoing description defined a *totally different individual other than appellant Charles A. Henry,* and when pressed for identity of this single source, *Larry Dean Clark* admitted that he, *Clark,* was *protecting* his single source, refusing to name him.

Yet, at trial, during direct examination, *Larry Dean Clark,* testifying under an admitted "deal" given him by the U.S. Attorney, Western District of North Carolina, named petitioner Henry as his *single* source.

He had testified that there was but one source on direct examination, that single source being able to produce, and did produce, 7 to 10 kilo grams of cocaine, when all that he, *Larry Dean Clark,* needed or wanted was a couple kilograms. In fact, a few months later, excess cocaine was *returned* to the source because it could not be sold.

Simply said, the effect of the testimony of chief government witness *Larry Dean Clark* was to give both *exonerating* evidence of petitioner and *incriminating* evidence of petitioner depending on which version of *Larry Dean Clark's* testimony was believed.

Charles Edward Franklin, the second government witness could not and did not identify petitioner as the source of cocaine, and thus did not incriminate petitioner, but testified in a manner exonerating of petitioner in conformance as above, that *Larry Dean Clark* had told him that their source of cocaine was the California individual having the foregoing hexagonal description of parents, wife, vehicle, transportation into North Carolina, transportation into the United States, and introduction to one *Robert Snowdon*.

Thus *Charles Edward Franklin* gave evidence *exonerating* of petitioner as the source of the cocaine and provided corroborating testimony of *Larry Dean Clark* that exonerated petitioner.

The United States District Judge instructed the jury as follows in areas relevant to the consequences of the government *accomplice as a matter of law* evidence:

> Now you have heard some testimony here from some witnesses who have been – who have committed crimes, who have participated in the same unlawful conduct which the government says the defendant participated in, and they have testified to you about what they saw and heard. Now that's referred to as the testimony of an accomplice, similar party. An accomplice is the testimony of a person who committed the same alleged offenses as its alleged that the defendant committed and comes and tells the Court and the jury about that. That's known as the testimony of an accomplice.
>
> Now the law is, and the Court so instructs you now, that the testimony of an accomplice in a criminal case must be scrutinized carefully and in light of the witness's interest in the outcome of the case. This

rule has been adopted because an accomplice is generally regarded as being interested in the jury's verdict and that he or she might be influenced in his or her testimony by that interest and misrepresent the facts so as to avoid punishment or sole punishment for his criminal conduct.

Now the Court instructs you that the witnesses who testified here that they partook in this alleged criminal activity are accomplices, and that their testimony must be examined by you in light of their interest in your verdict, and it should be examined carefully, scrutinized closely, in light of their interest.

Now the Court instructs you that after you have examined the testimony of the accomplice witnesses, if you find that they are telling the truth, then you would give their testimony the same weight and credibility as you would give the testimony of a disinterested witness.

Now the Court instructs you that the unsupported testimony of an accomplice, while it should be received by you, the jury, with great caution, is sufficient under the law to sustain a conviction if it produces proof of the defendant's guilt to convince the jury of the defendant's guilt beyond a reasonable doubt.

Petitioner asserts Fifth Amendment denial of due process of law and denial of his rights under the Sixth Amendment to produce witnesses in his defense by failure of the District Court to overtly instruct that government witnesses who are *accomplices as a matter of law* can also serve to acquit petitioner, and that their *exonerating* testimony need not be believed beyond a reasonable doubt – that exonerating testimony only need *raise* a reasonable doubt.

Petitioner asserts that the conflict in testimony provided by *Larry Dean Clark* which contained both incriminating and exonerating evidence, and the testimony of Charles Edward Franklin, which was wholly exonerative, created a reasonable doubt integrally, and under the limited jury instructions caused the jury to potentially disregard their entire testimony, including the exonerative testimony, which need only *raise* a reasonable doubt, thus "throwing the baby out with the bath water," and sweeping from the case petitioner's defense that a totally different person was the source of the cocaine and had been so described by Larry Dean Clark prior to Clark's arrest, and prior to Franklin's arrest, and at a time prior to Clark's motive to name petitioner as his single source of cocaine in order to secure a "deal" from the United States.

In addition to the accomplice as a matter of law testimony of Larry Dean Clark and Charles Edward Franklin, the government provided motel-hotel information that petitioner was in the Georgia-North Carolina area around the time that Clark asserted that he received the cocaine, and airplane travel-ticket information that appellant had flown to the area at that time.

The importance and consequences of the latter evidence are that the jury could have looked to it to convict petitioner after wrongly failing to use the exonerating evidence to acquit appellant upon the proper standard that it need only *raise* a reasonable doubt.

In summary, petitioner was convicted on testimony given by *accomplices as a matter of law* that also gave *exonerating* testimony; while the court instructed that a *conviction* could be returned if the jury believed the

accomplices beyond a reasonable doubt, the court failed to instruct that the *accomplice* testimony could be the basis of an *acquittal* if it only *raised* a reasonable doubt; if the jury found a reasonable doubt, in the *accomplice* testimony, the jury could potentially look to hotel-motel-airline bills to establish the guilt, while immediately prior thereto it had erroneously and systematically eliminated the exonerating defense testimony, all under the erroneous jury instructions.

Petitioner asserts denial of the 5th and 6th Amendment rights and protection, and under both a constitutional standard and under this Honorable Court's supervisory power over the lower federal courts, certiorari should be granted.

Failure of the U.S. 4th Circuit to recognize the mandates of *Cool v. United States* (1972) 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335, and a now-existing conflict in the U.S. Circuit Courts, should cause the grant of certiorari. Cf. *United States v. Stulga*, 531 F.2d 1377 (6th Cir. 1976) (Stulga I) and *United States v. Stulga*, 584 F.2d 142 (6th Cir. 1978) (Stulga II) with the instant opinion.

Caveat: A study of the unpublished opinion of the U.S. 4th Circuit (Appendix "A") would leave one hard pressed to understand what that appeal and this petition is all about, the opinion not analyzing petitioner's facts and consitutional contentions. It is therefore mandatory that this court take careful note of petitioner's facts set forth above, juxtaposed against the commands of *Cool v. United States*, supra, *United States v. Stulga* (Stulga I), supra, and *United States v. Stulga* (Stulga II), supra.

ARGUMENT IN SUPPORT OF GRANT OF CERTIORARI

Under the commands of *Cool v. United States*, (1972) 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335, and *United States v. Stulga*, 531 F.2d 1377 (6th Cir. 1976) (Stulga I), and *United States v. Stulga*, 584 F.2d 142 (6th Cir. 1978) (Stulga II) petitioner's jury must have been instructed that the testimony of *accomplices as a matter of law* who give exonerating testimony in a federal criminal trial may also serve to acquit a federal criminal defendant if that testimony only *raises* a reasonable doubt, in addition to allowing a conviction if believed beyond a reasonable doubt. Failure to so instruct denies due process of law under the 5th Amendment and the right to produce witnesses in defense of federal criminal charges under the 6th Amendment; in view of the command of *Cool* and a conflict in the United States Circuit Courts as evidenced by *Stulga I* and *Stulga II*, certiorari must be granted; under the supervisory role of this honorable court over the lower federal courts, certiorari must be granted.

At this federal criminal prosecution in the Western District of North Carolina the only issue of fact was whether petitioner Henry or another, and totally different, Californian was the source of an alleged 7 to 10 kilograms of cocaine brought into North Carolina by that source circa May, 1986.

Larry Dean Clark was the only witness able to implicate petitioner Henry. One Hogshed was arrested selling cocaine to undercover agents. Under a "deal", Hogshed named his source, Charles Edward Franklin; Franklin was then arrested and was offered a "deal" to name his source. Franklin identified Larry Dean Clark as his

source. Clark was then arrested, and was offered a "deal" to name his source.

Clark testified at trial that his *sole source* was able to supply over 10 kilograms of cocaine, far beyond his needs; he thus did *not* have a second source, and did not need one. At trial, on direct examination, Clark claimed petitioner Henry to be that source. However, on cross-examination Clark admitted that before he was arrested and thus had a motive to name someone as his source, he had identified his California source as a California male:

(1) whose wife was and/or had been in a rehabilitation center;

(2) whose parents had a lien placed on their assets in California;

(3) who drove a blue Swedish Volvo;

(4) who brought the cocaine to North Carolina cached in the rocker panels of that volvo;

(5) who had an aircraft pilot friend who was a smuggler who had just been released from jail; and

(6) who had been introduced to one Robert Snowdon by Clark.

This source was *not* petitioner Henry. On cross-examination Clark admitted that he was now protecting the identity of this male that he originally named as his source, and in order to secure his deal, he *had to give the government evidence of criminal conduct of petitioner Henry.* (R.T.A. 64, lines 8-10).

Charles Edward Franklin, the receiver of cocaine from Clark, had been told by Clark that the source was the above uniquely described California male, which was *not*

petitioner Henry. Thus, if believed, Clark and Franklin both gave exonerating testimony of and concerning petitioner as not being the source of the cocaine. While Clark gave both incriminating evidence (naming appellant as his source on direct examination) and exonerating evidence (admitting that he named a totally different, well-described male as the source before his arrest, and before he needed to name someone as his source to get his deal), Charles Franklin gave only exonerating evidence, since Franklin had no evidence that linked appellant to the case whatsoever.

U.S. District Judge Woodrow W. Jones charged the jury that Clark, Franklin, and Hogshed were *accomplices as a matter of law* and their testimony was subject to several jury instructions, of which the following are relevant:

> Now you have heard some testimony here from some witnesses who have been – who have committed crimes, who have participated in the same unlawful conduct which the government says the defendant participated in, and they have testified to you about what they saw and heard. Now that's referred to as the testimony of an accomplice, similar party. An accomplice is the testimony of a person who committed the same alleged offenses as its alleged that the defendant committed and comes and tells the Court and the jury about that. That's known as the testimony of an accomplice.
>
> Now the law is, and the Court so instructs you now, that the testimony of an accomplice in a criminal case must be scrutinized carefully and in light of the witness's interest in the outcome of the case. This rule has been adopted because an accomplice is generally regarded as being interested in the jury's verdict and that he or she might be influenced in his or her testimony by that interest and misrepresent the

facts so as to avoid punishment or sole punishment for his criminal conduct.

Now the Court instructs you that the witnesses who testified here that they partook in this alleged criminal activity are accomplices, and that their testimony must be examined by you in light of their interest in your verdict, and it should be examined carefully, scrutinized closely, in light of their interest.

Now the Court instructs you that after you have examined the testimony of the accomplice witnesses, if you find that they are telling the truth, then you would give their testimony the same weight and credibility as you would give the testimony of a disinterested witness.

Now the Court instructs you that the unsupported testimony of an accomplice, while it should be received by you, the jury, with great caution, is sufficient under the law to sustain a conviction if it produces proof of the defendant's guilt to convince the jury of the defendant's guilt beyond a reasonable doubt.

However, as has been noted, both Clark and Franklin gave *exonerating* testimony as each revealed that prior to arrest and prior to a motive to save himself by naming *someone* as his source, Clark had named a well-described Californian as his source, and that well-described Californian was *not* petitioner Henry.

Petitioner asserts denial of due process of law in the Court failing to instruct the jury that testimony given by accomplices as a matter of law can also be used to *acquit* the defendant if they also give exonerating testimony and that exonerating testimony merely *raises* a reasonable doubt. This unique situation is restricted to government witnesses who

(1) are accomplices to the crimes charged against the defendant, and

(2) give *exonerating* evidence as well as *incriminating* evidence (Larry Dean Clark) or give only *exonerating* evidence (Charles Edward Franklin). This requirement stems from the fact that if the accomplices are not believed beyond a reasonable doubt in the incriminating portion of their testimony, the jury potentially can *reject the entirety* of their testimony, sweeping it from the case, including the *exonerating* evidence. The removal of the exonerating evidence thusly is constitutional error, for it must be judged by the lesser credibility standard of merely *raising* a reasonable doubt. Petitioner's helpful and exonerating evidence thus was surely and systematically removed from the case by this defective charge to the jury.

Petitioner and the United States do not write on a clean slate. In *Cool v. United States* (1972) 409 U.S. 100, this Honorable Court initially considered this related issue where the District Judge instructed the jury virtually identical to petitioner's jury charges. In *Cool,* one Voyles, an accomplice, gave generally exonerating evidence, just as in the case at bar where Charles Edward Franklin gave solely exonerating evidence.

This Honorable Court said:

> With the case in this posture, the Government's position clearly depended upon its ability to discredit Voyles, since his testimony was completely exculpatory. Over strenuous defense objection,[2] the trial judge gave the jury a lengthy "accomplice instruction" to be used in evaluating Voyles' testimony.

> After first defining the word "accomplice" and warning that an accomplice's testimony is "open to suspicion," the judge made the following statement: "However, I charge you that the testimony of an accomplice is competent evidence and it is for you to pass upon the credibility thereof. If the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt*, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source." (Emphasis added.)
>
> [3] The clear implication of this instruction was that the jury should disregard Voyles' testimony unless it was "convinced it is true beyond a reasonable doubt."[3] Such an instruction places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt.[4]

At footnote 4, 409 U.S. 100, 103, this Court further said:

> [3] 4. In the next paragraph of his instruction, the judge stated: "I further instruct you that testimony of an accomplice may alone and uncorrobated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against the defendants." In light of the fact that the only accomplice testimony in the case was exculpatory, this instruction was confusing to say the least. But even if it is assumed that Voyles' testimony was to some extent inculpatory, the instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling them that they could acquit on this basis. Even had there no other error, the conviction would have to be reversed on the basis of this instruction alone.

Finally, this Court held:

> [5] In Washington v Texas, supra, we held that a criminal defendant has a Sixth Amendment right to present to the jury exculpatory testimony of an accomplice. The instruction given below impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable.
>
> [6] Moreover, the instruction also has the effect of substantially reducing the Government's burden of proof. We held in In re Winship, supra, that the Constitution requires proof of guilt beyond a reasonable doubt. It is possible that Voyles' testimony would have created a reasonable doubt in the minds of the jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt. By creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the Government to carry its burden. Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of the judge's instructions is to require the defendant to establish his *innocence* beyond a reasonable doubt.
>
> [1] Because such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence, the conviction must be reversed and the cause remanded for further proceedings not inconsistent with this opinion. It is ordered.

It is of note that then Justice Rehnquist and Justice Blackmun dissented, and it is, of course, arguable that the *Cool* rationale should be re-examined; however, it appears to be the current and viable mandate of this Honorable Court in a 6-3 decision, and petitioner was deprived, in

this case, of due process by the Court's inadequate and unconstitutional instructions.

Finally, petitioner would note that the U.S. Sixth Circuit has embraced the *Cool* logic in 2 separate decisions involving one Edward Stulga.

In *United States v. Stulga* 531 F.2d 1377 (6th Cir. 1976) the following jury instruction was held to violate the *Cool* doctrine:

> There has been testimony in this trial from witnesses whom you may find to have been accomplices. An accomplice is one who unites with another in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participating in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict a defendant upon the unsupported testimony of an accomplice, *unless you believe the unsupported testimony beyond all reasonable doubt.* (Emphasis added.)[4]

The Sixth Circuit, in reversing, noted:

> We find that the accomplice portion of the charge could be confusing to the jury as to burden of proof, despite the judge's remarks about the government's burden earlier in the charge.
>
> The district judge was in error in failing to instruct the jury on evaluating the exculpatory testimony offered by the government's two main witnesses. The judge instructed the jury on evaluating an accomplice's inculpatory testimony despite the

virtual dearth of inculpatory testimony from witnesses who could be considered accomplices, but neglected to instruct the jury as to the appropriate manner in which to evaluate the wealth of exculpatory testimony furnished by accomplices. This lack of precision in the charge could very well have confused the jurors, they might have erroneously concluded that they had to believe the accomplice's exculpatory testimony beyond a reasonable doubt before it could support a defense for Appellant. As the Supreme Court noted in *Cool*, the imposition of such a burden could allow "the jury to convict despite its failure to find guilt beyond a reasonable doubt."[6]

We conclude for the foregoing reasons that an improper burden was placed on Appellant.

The cause is remanded for proceedings consistent with this opinion.

On retrial, the following instruction was approved in *United States v. Stulga*, 584 F.2d 142, 144:

"There has been testimony in this trial from witnesses whom you may find to have been accomplices. An accomplice is one who unites with another in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care.

"The testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. You should not convict a defendant upon the unsupported testimony of an accomplice, however, unless you believe that unsupported testimony beyond all reasonable doubt.

> "I further charge you that, to the extent, if any, that you find the testimony of an accomplice tends to support the contention of the defendant, that is, tends to show the defendant to be not guilty, you may consider such testimony in that respect and weigh such testimony, along with the other evidence in the case, under the rules given you in this charge, and you may find the defendant not guilty based on an accomplice's testimony."

The 6th Circuit, in affirming the conviction on retrial, noted:

> We conclude that the instructions, as given on retrial, expressed the law on accomplice testimony, were adequate and in accordance with the law of *Cool v. United States, supra,* and our opinion in the prior appeal (531 F.2d 1377).

Petitioner asserts that the previous out of court statements made by Larry Dean Clark enter the case as substantive evidence as long as confrontation and cross-examination before the trier of fact are available. *Nelson v. O'Neil,* 402 U.S. 622, 29 L.Ed.2d 222, 91 S.Ct. 1723; *California v. Green,* 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930. Thus, Larry Dean Clark naming *another* person as his source of cocaine is evidence at the same level as his naming of petitioner at trial as the source of cocaine. This emphasizes the severe error in failing to give the instruction that exonerating testimony may be used to acquit, and it merely need *raise* a reasonable doubt.

It is plain, therefore, the proper way of instructing the jury on this unique situation where accomplices also supply exonerating testimony, is shown by Stulga II at 144. See also *United States v. Armocida,* 515 F.2d 29, 47-48

(3rd Cir. 1975), holding error in that jury instruction under *Cool*, but finding harmless error.

Based on the unique set of facts and law presented by government witnesses who are accomplices and give exonerating testimony, due process requires the specific jury instructions set forth in *Cool* and Stulga II.

This is not only a federal due process issue under the 5th and 6th Amendments, but raises a fully equivalent issue under this Honorable Court's supervisory role over the lower Federal Court system. See *Mesarosh v. United States*, 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1 (false government evidence introduced in federal trial evaluated under supervisory role over the lower federal courts).

In view of the above, this Honorable Court should grant certiorari to the United States Court of Appeals for the Fourth Circuit.

There is either error in this case under *Cool v. United States*, 409 U.S. 100, or the authority of that case should be excised from the law of required jury instructions in the federal system. In either case certiorari is warranted.

CONCLUSIONS

For each and every one of the foregoing deprivations of rights under the 5th and 6th Amendments, for the failure of lower U.S. Courts to follow the commands of *Cool v. United States* (1972), 409 U.S. 100, and because of a conflict in the U.S. Circuit Courts, certiorari to the United

States Court of Appeals for the Fourth Circuit should be granted.

Dated: May 10, 1989

Respectfully submitted,

/s/ Roger S. Hanson
ROGER S. HANSON
Attorney for Petitioner
Member of Bar
United States Supreme Court

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5033

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CHARLES A. HENRY,
a/k/a Chuck Henry

Defendant-Appellant

Appeal from the United States District Court for the Western District of North Carolina, at Bryson City. Woodrow W. Jones, District Judge. (Cr. 87-42-B)

Argued: November 4, 1988 Decided: February 21, 1989

Before HALL and PHILLIPS, Circuit Judges, and KNAPP, Senior District Judge for the Southern District of West Virginia, sitting by designation.

Roger Sandberg Hanson for Appellant. Kenneth Davis Bell, Assistant United States Attorney (Thomas J. Ashcraft, United States Attorney, on brief) for Appellee.

PER CURIAM:

This appeal from a narcotics conviction presents challenges to several instructions proffered by the Court to the jury. Finding the contentions of the defendant without merit, we affirm the conviction.

I.

In April 1987 appellant Henry was indicted on charges of conspiracy to unlawfully possess and distribute cocaine in violation of 21 U.S.C. § 846, possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). He was convicted by a jury and sentenced to twenty (20) years imprisonment on the first count and to a term of ten years imprisonment on each of the second and third counts to be served concurrently with the sentence imposed on count one. At trial testimony for the government came from Larry Dean Clark who identified the appellant as the source of supply of the cocaine charged in the indictment.

The evidence showed that Clark had known Henry since attending high school in California. Clark began selling drugs in 1985 in Western North Carolina with his source of supply being Eddie Franklin. During 1986 Clark contacted Henry and Bob Luter to arrange a cocaine deal. In April 1986 Clark met them along with E. Rodriguez at a hotel in Georgia where Henry suggested that he supply Clark with ten kilograms of cocaine. Later Henry, Luter, Rodriguez, and several other unidentified Latin males delivered seven kilograms of cocaine to Clark's home in Franklin, North Carolina. The price for the cocaine was $32,000 per kilogram. Sometime after the delivery of the cocaine, Clark met Henry at a shopping center in Gainesville, Georgia, where he paid $30,000 to $40,000 for cocaine already sold. Clark met Henry at the same shopping center and made similar payments on three to five other occasions.

In July or August Clark returned one and one-half to two and one-half kilograms of cocaine to one of the Latin males who had delivered it to Clark. A total of $150,000 was paid by Clark to Henry for approximately five kilograms of cocaine Clark was able to sell. One of the kilograms Clark acquired from Henry went to Franklin.

Clark told Franklin that the cocaine was coming from Florida and that the source was from "out west." Clark also testified that he had other sources for drugs in California and that he was protecting someone from authorities.

At trial Eddie Franklin testified that he had an arrangement with Clark wherein Clark would acquire cocaine, Franklin would distribute it and they would split the profits. Franklin had never been told by Clark who his source of supply was nor how many sources he had. Franklin stated that sometime between April and June 1986 he and Clark increased their activities by dealing in several kilogram quantities of cocaine. Franklin recalled that Clark received a large shipment of cocaine while Franklin was at Myrtle Beach, South Carolina. Franklin's telephone records indicated that he was in Myrtle Beach from May 20 through May 22, 1986.

Clark and Franklin were corroborated by Henry's American Express records, the records of Eastern Airlines, Avis Rent-A-Car and eight hotels. Analysis of these records demonstrated that Henry flew from Ontario, California to Atlanta, Georgia on May 13, 1986 along with E. Rodriguez and an F. Krasco. For the next three weeks, until June 6, 1986, Henry and others checked in and out of nine hotels and motels in the north Georgia area. Thereafter, Henry returned to Ontario, California.

II.

Henry's contentions on appeal center around three issues. Appellant argues that the court failed properly to instruct the jury on the meaning of reasonable doubt. We find that the district court's instruction was accurate and correct and did not require further elaboration; the court's instruction followed the mandate set forth in *U.S. v. Woods*, 812 F.2d 1483, 1487 (4th Cir. 1987); *U.S. v. Love*, 767 F.2d 1052, 1060 (4th Cir. 1985).

Henry contends that the court's instruction concerning testimony of an accomplice was error. Appellant argues that Franklin's testimony at trial regarding his source was exculpatory evidence for Henry, and asserts that the instruction pertaining to the testimony of an accomplice must be in accordance with the principles set forth in *Cool v. U.S.*, 409 U.S. 100 (1972).

Upon review of the record, we conclude that there was no evidence which could be called exculpatory as set forth in *Cool*. Clark consistently stated that Henry was his supplier for the cocaine. Franklin didn't know whether or not Henry supplied the cocaine. At most Franklin's testimony may contradict Clark but clearly does not exculpate Henry. The facts of this case are not unusual. The accomplice instruction given by the court was under the particular facts an acceptable expression of applicable law.

Lastly, Henry contends that the jury charge of conspiracy omitted one of the elements of the crime. Appellant argues that the instruction did not include that the overt act must be committed in furtherance of the object of the conspiracy relying on *U.S. v. Friedman*, 445 F.2d 1076, 1084 (9th Cir. 1971), as authority.

A review of the Court's instructions convinces us that the court clearly included the alleged deficiency in its definition of an overt act. The court recited:

> An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent as the act of a person walking across the street or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or purpose and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

The charge to the jury must be reviewed "as a whole to see if the entire charge delivered a correct interpretation of the law." *California v. Brown*, 479 U.S. 538, 93 L.Ed.2d 934, 107 S.Ct. 837 (1987).

As set forth in *U.S. v. Pope*, 561 F.2d 663, 670 (6th Cir. 1977), to determine the propriety of a jury instruction, the instruction must be viewed in its entirety; a misstatement in one part of the charge does not require reversal if elsewhere in the instruction the correct information is conveyed to the jury in a clear and concise manner. Based on the foregoing conclusions, we deem the charge to be sufficient.

Accordingly, we affirm Henry's convictions.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 88-5033

– United States of America

Plaintiff-Appellee

versus

Charles A. Henry,
a/k/a Chuck Henry

Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

Filed March 16, 1989

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Phillips and Judge Knapp.

For the Court,
JOHN M. GREACEN
CLERK